88-372 (1)

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NO. 87-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL LEWIS, et al.,

Petitioners,

-vs-

STEVEN ALLEN BRUNI,

Respondent,

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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the State of Arizona

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QUESTION PRESENTED

May the federal courts reach the merits of a state prisoner's 28 U.S.C. § 2254 claim if the state court found a state procedural default and also mentioned the merits of the claim?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
JUDGMENT SOUGHT TO BE REVIEWED	1
OPINION BELOW	2
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	4
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	11
CERTIFICATION	13
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1
APPENDIX D	D-1

TABLE OF CASES AND AUTHORITIES

Cases	Page
Cook v. Lynaugh 821 F.2d 1072 (5th Cir. 1987)	9
Davis v. Allsbrooks 778 F.2d 168 (4th Cir. 1985)	9
Edwards v. Arizona 451 U.S. 477 101 S.Ct. 1880 68 L.Ed.2d 378 (1981)	6,7,8,11
Engle v. Issac 456 U.S. 107 102 S.Ct. 1584 71 L.Ed.2d 783 (1982)	8
Phillips v. Smith 717 F.2d 44 (2d Cir. 1983)	9
Smith v. Wainwright 777 F.2d 609 (11th Cir. 1985)	9
State v. Bruni 129 Ariz. 312 630 P.2d 1044 (Ct.App. 1981)	6
Thompson v. Lynaugh 821 F.2d 1080 (5th Cir. 1987)	10
United States ex rel. Caruso v. Zelinsky 689 F.2d 435 (3d Cir. 1982)	10

United States ex rel. Merneigh
v. Greer
772 F.2d 322 (7th Cir. 1985) 10

Wainwright v. Sykes
433 U.S. 72
97 S.Ct. 2497
53 L.Ed.2d 594 (1977) 8

Authorities

Ariz.Rev.Stat.Ann.
§ 13-4232(A)(3) 8

28 U.S.C.
§ 1254(1) 3
§ 1291 3
§ 2241 3
§ 2253 3
§ 2254 3,8,11
§ 2254(b) 4

Arizona Rules of Criminal Procedure
Rule 32.2(a)(3) 7

United States Constitution
Fifth Amendment 4
Fourteenth Amendment 4

JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Arizona Attorney General on behalf of the State of Arizona and Samuel Lewis, Director, Department of Corrections, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 24, 1988, and the Petition for Rehearing denied on July 7, 1988. (Appendices A and B.)

OPINION BELOW

The Ninth Circuit's opinion held that because the state appellate court denied the prisoner's claim on alternate grounds, reaching a decision on the merits as well as invoking a procedural ground, the state procedural bar was vitiated and the federal courts could rule on the merits.

STATEMENT OF JURISDICTION

Steven Allen Bruni appealed the order of the United States District Court for the District of Arizona denying his application for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

The Ninth Circuit entered its opinion on May 24, 1988, and denied rehearing on July 7, 1988. This petition is timely filed within 60 days of the order denying the motion for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

AND STATUTE INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

The pertinent portion of the Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

The pertinent part of 28 U.S.C. § 2254(b):

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF FACTS

In 1980, a jury convicted Bruni of 14 counts of kidnapping, sexual assault and aggravated assault. Prior to his trial in state court, Bruni had filed a motion to suppress the statements he made to police officers. At the pretrial hearing on the motion to suppress, two police officers testified regarding the circumstances under which Bruni made his statements. Bruni did not present any evidence at the suppression hearing, nor did he argue that there was any basis for suppressing the statements. The trial court denied his motion to suppress, and his statements were introduced in evidence at trial.

In his direct appeal to the Arizona Court of Appeals, appellant did not raise any issue in regard to the admission of his statements in evidence.

The intermediate appellate court affirmed the convictions and sentences in State v. Bruni, 129 Ariz. 312, 630 P.2d 1044 (Ct.App. 1981). Two counts were remanded for resentencing. The Arizona Supreme Court subsequently denied review on June 30, 1981. Id.

In 1981, this Court decided Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). In May of 1982, Bruni filed a petition for post-conviction relief in the Arizona trial court. Bruni tried to raise an Edwards issue in this petition. The state argued that he was precluded from raising this issue since he had not raised it in the direct appeal. The trial court summarily denied relief without addressing the merits. Bruni petitioned for review and both parties briefed his claims in the court of

appeals where the post-conviction petition had been consolidated with the appeal of the resentencings. The Arizona Court of Appeals denied relief on the Edwards issue on September 6, 1983, with the following language:

> Third, appellant's claim regarding the voluntariness of his statements was explored in pretrial motions but not raised on appeal and therefore is deemed waived. Rule 32.2(a)(3), Arizona Rules of Criminal Procedure, 17 A.R.S. In any case, appellant was willing to talk and no constitutional violation occurred.

(Appendix C, citation omitted.) The Arizona Supreme Court subsequently denied review without reference to procedural bar or the merits of the claim.[1]

(Appendix D.)

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1. Arizona's Rule 32.2(a)(3) provides that, "A petitioner will not be given relief under this rule based upon any ground: . . . (3) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral

Bruni raised his Edwards issue in his 1987 federal petition for writ of habeas corpus. The state argued that he should have been required to show cause and prejudice due to his state procedural default. The federal courts ignored the state procedural default because the state appellate court had mentioned the lack of merit in Bruni's Edwards claim. (Appendix A.)

REASONS FOR GRANTING THE WRIT

Failure to appropriately raise a federal constitutional issue in state court may foreclose federal review under 28 U.S.C. § 2254. Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1584, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). There is disagreement among the federal

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proceeding. See also Ariz.Rev.Stat.Ann. § 13-4232(A)(3), using the same language.

circuit courts about whether they must honor a finding of procedural bar made by the state courts when the state courts make an alternative finding on the merits of the same issue. The majority rule is that, when a state court bases its decision upon the alternative grounds of procedural default, and a rejection of the merits a federal court must, in the absence of good "cause" and "prejudice," deny habeas relief because of the procedural default. Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987); Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985); Shepard v. Foltz, 771 F.2d 962, 965 (6th Cir. 1985); Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), reh denied en banc, 785 F.2d 1032 (1986), cert. denied, 477 U.S. 905 (1986); Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), cert. denied, 465 U.S. 1027 (1984);

United States ex rel. Merneigh v. Greer, 772 F.2d 322 (7th Cir. 1985); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982). This rule has been observed even where the procedural default is the second ground stated for relief by the state court rather than the first ground stated. Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir.), cert. denied, _____U.S.____, 108 S.Ct. 5, 97 L.Ed.2d 794 (1987).

Petitioner submits that the majority view is the better one because it gives effect to the principle of comity and more closely follows this Court's decisions. The Ninth Circuit's position on the other hand penalizes the state appellate court for instructing the state's trial courts on federal constitutional issues. It is very clear that the Arizona Court of Appeals applied

Arizona's procedural default rule and found that Bruni had waived any Edwards issue by failing to raise it on direct appeal. The federal courts should have honored that finding and required the habeas petitioner to show cause and prejudice before they reached the merits of the claim.

CONCLUSION

The application of the cause and prejudice test for state procedural default is not now uniformly applied through the federal circuits. No matter how crystal clear a state court's finding of procedural default, the Ninth Circuit will review the merits of a state prisoner's § 2254 claim if a state court makes note of the merits of that claim. This Court should accept this petition, review the various circuit opinions and hold that the majority view on

alternative state court findings should be followed in all federal courts.

DATED this 23rd day of August, 1988.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

GEORGIA B. ELLEXSON
Assistant Chief Counsel

DIANE M. RAMSEY
Assistant Attorney General

Attorneys for PETITIONERS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GEORGIA B. ELLEXSON, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That she served three copies of the Petition for Writ of Certiorari upon Robert Bartels, Arizona State University Law School Clinic, Tempe, Arizona, 85281, Attorney for Steven Allen Bruni, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, she herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General,

Department of Justice, Washington, D.C.

20530.

DATED this 23rd day of August, 1988.

GEORGIA B. ELLEXSON
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Phoenix, Arizona 85007
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SUBSCRIBED AND SWORN to before me

this 23rd day of August, 1988.

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

CRM87-0540
6775d jd (DMR)

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN ALLEN BRUNI, Petitioner-Appellant, vs. SAMUEL LEWIS, Director of Arizona Department of Corrections; ROBERT CORBIN, Attorney General, State of Arizona, Respondents-Appellees.	)	No. 87-2990 D.C. No. CV 87-0270-ACM ORDER AMENDING OPINION

Appeal from the United States
District Court for the
District of Arizona
Alfredo C. Marquez, District
Judge, Presiding
Argued and Submitted
April 12, 1988 -
San Francisco, California
Filed May 24, 1988
Amended July 12, 1988

Before: Herbert Y.C. Choy, Joseph T. Sneed and Procter Hug, Jr., Circuit Judges.
Opinion by Judge Choy

SUMMARY

Criminal Procedure

Appeal from denial of petition for a writ of habeas corpus. The court affirmed holding that a defendant may selectively waive his Miranda rights.

Detective Comstock arrested appellant Bruni and read him his Miranda rights. She asked him if he would answer her questions. Bruni replied, "Not without my attorney." He then added immediately, "Well, ask your questions, and I will answer those I see fit." He was not questioned further. At the Pima County Attorney's Office, Detective Kohlman read Bruni his rights. He asked Bruni if he would answer questions. Bruni replied that he would answer "those he felt good to answer or that he thought his attorney

would probably advise him to answer." He was interrogated. At trial, Bruni unsuccessfully objected to the prosecution's introduction of statements elicited from him during his interrogation. Bruni was convicted. The state appellant [sic] court affirmed. The court denied his petition for post-conviction relief. The Arizona appellate court affirmed. The Arizona Supreme Court dismissed his petition. The U.S. District Court denied his habeas petition.

[1] A defendant may selectively waive his Miranda rights, deciding to respond to some questions but not others. [2] Bruni asserts that by invoking his right to counsel and then immediately waiving that right he made an equivocal request for counsel. Bruni's second statement effected a selective waiver by indicating

an agreement to answer some questions but not others. Therefore, to the extent that Bruni later chose to answer questions, he waived his right to counsel. [3] When Kohlman sought to question Bruni and Bruni responded with answering those questions he felt good to answer, [4] this statement was not an attempt to invoke a present right to counsel.

COUNSEL

Robert Bartels, Douglas A. Blaze, Aimee L. Burr, Student, Ann Harwood, Student, Harry A. Wolin, Student, Arizona State University Law School Clinic, Tempe, Arizona, for the petitioner-appellant. Diane M. Ramsey, and Barbara A. Jarrett, Assistant Attorneys General for the State of Arizona, Phoenix, Arizona, for the respondents-appellees.

ORDER

The opinion filed May 24, 1988, is amended as follows: At page 8516 of the slip opinion delete in the first full paragraph "that are adopted by the district court are reviewed for clear error" and in its place insert "are presumed correct and will not be set aside unless lacking fair support in the record, McKenzie v. Risley, 842 F.2d 1525, 1531 (9th Cir. 1988) (en banc)"

OPINION

CHOY, Circuit Judge:

OVERVIEW

Steven Allen Bruni ("Bruni"), an Arizona state prisoner who was convicted of 14 counts of kidnapping, sexual assault and aggravated assault, appeals from the district court's denial of his

petition for a writ of habeas corpus under 28 U.S.C. § 2254. Bruni claims that police interrogation violated his fifth amendment right to counsel. We disagree and affirm.

BACKGROUND

On October 22, 1979, a Tucson, Arizona police officer stopped Bruni for having unusually loud muffler pipes on his car. The officer recognized the car as one identified with a number of sexual assault cases under investigation. The officer notified his supervisor, who in turn informed Detective Comstock.

Upon arriving at the scene, Detective Comstock recognized Bruni as a suspect in several recent sexual assault cases and arrested him. She read Bruni his Miranda rights and asked him if he understood them. After he responded affirmatively, she asked him if he would answer her

questions. Bruni replied, "Not without my attorney." He then added immediately, "Well, ask your questions, and I will answer those I see fit." Detective Comstock then asked him "if that meant he would be willing to answer the questions that he wanted to answer himself." Bruni said, "Yes."

Detective Comstock did not question Bruni further but had him transported to the Pima County Attorney's Office where he met Detective Kohlman. At his request, Bruni first spoke with his parole officer. Afterwards, Detective Kohlman read Bruni his Miranda rights and asked him if he understood them. Having secured Bruni's assent, Detective Kohlman asked Bruni if he would answer questions. Bruni replied that he would answer "those he felt good to answer or that he thought his attorney would

probably advise him to answer." Detective Kohlman then interrogated Bruni at length. During this interrogation, Bruni did not attempt to invoke his right to silence or right to counsel.

At trial, Bruni unsuccessfully objected to the prosecution's introduction of statements elicited from him during his interrogation by Detective Kohlman. Bruni was convicted on August 29, 1980, of 14 counts of kidnapping, sexual assault and aggravated assault. He appealed his conviction but did not raise the issue of his interrogation by Detective Kohlman at that time. On May 4, 1981, the state appellate court affirmed his conviction, though it remanded for sentencing on two counts.

On May 3, 1982, Bruni filed a petition for post-conviction relief in Arizona superior court. He now claimed that

Detective Kohlman's interrogation violated his fifth amendment right to counsel. The court denied his petition. The Arizona appellate court affirmed the denial. Bruni then petitioned for review in the Arizona Supreme Court, which dismissed his petition.

Bruni next sought federal habeas relief in the United States District Court for the District of Arizona. He timely appeals from that court's denial of his habeas petition.

DISCUSSION

I. State Procedural Bar

Initially, the State of Arizona ("state") asserts that the district court incorrectly reached the merits of Bruni's habeas petition. The state maintains that Bruni is procedurally barred from seeking federal habeas relief.

A state prisoner may not receive federal habeas relief if his constitutional claim has been barred in state court on a procedural ground, unless the prisoner can show cause for his procedural default and resulting prejudice. See Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977). However, if the state court denied the prisoner's claim on alternate grounds, reaching a decision on the merits as well as invoking a procedural ground, the state procedural bar is vitiated. Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979); see also Walker v. Endell, 828 F.2d 1378, 1382 (9th Cir. 1987); Huffman v. Ricketts, 750 F.2d 798, 800-01 (9th Cir. 1984).

Here, Bruni failed to directly appeal his fifth amendment claim. In his state

post-conviction proceeding, the appellate court ruled that this waived his claim under Arizona law. The court nonetheless addressed the merits of Bruni's claim and found no constitutional violation.[1] Since the state court did not rely exclusively on a procedural ground in denying Bruni's petition, we reach the merits.

II. Right to Counsel

We review de novo a district court's decision to deny a petition for writ of

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[1]The court stated that "appellant's claim regarding the voluntariness of his statements was explored in pretrial motions but not raised on appeal and therefore is deemed waived. . . . In any case, appellant was willing to talk and no constitutional violation occurred."

Bruni's subsequent petition to the Arizona Supreme Court was denied without explanation. We thus presume that the state supreme court's denial was also on the merits. See Turner v. Compoy, 827 F.2d 526, 529-30 (9th Cir. 1987), petition for cert. filed, (Nov. 27, 1987).

habeas corpus. Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987). Furthermore, while the historical factual findings of a state court are presumed correct and will not be set aside unless lacking fair support in the record, McKenzie v. Risley, 842 F.2d 1525, 1531 (9th Cir. 1988) (en banc), we may give different legal weight to such facts. Hayes v. Kincheloe, 784 F.2d 1434, 1436 (9th Cir. 1986), cert. denied, 108 S.Ct. 198 (1987); see Sumner v. Mata, 455 U.S. 591, 597 (1982) (per curiam).

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that before government officials conduct a custodial interrogation of a defendant, they must inform him of his fifth amendment right to remain silent and to receive assistance of counsel before and during questioning. To proceed to

question the defendant, officials must first satisfy the "heavy burden" of establishing that the defendant "knowingly and intelligently waived his privilege against self-incrimination and his right to . . . counsel." Id. at 475. In determining whether the government has met its burden, a court must examine "'the particular facts and circumstances surrounding th[e] case, including the background, experience, and conduct of the accused.'" Edwards v. Arizona, 451 U.S. 477, 482 (1981) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

Edwards applied these principles in holding that government officials must discontinue interrogation of a defendant who invokes his right to counsel until the defendant meets with counsel, unless the defendant initiates further

communication with government officials. 451 U.S. at 484-85.[2]

[1] However, a defendant may selectively waive his Miranda rights, deciding "to respond to some questions but not others." United States v. Thierman, 678 F.2d 1331, 1335 (9th Cir. 1982); see Michigan v. Mosley, 423 U.S. 96, 103-04 (1975). Nevertheless, if a defendant makes an equivocal request for counsel during interrogation, officials

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[2] In Shea v. Louisiana, 470 U.S. 51, 59 (1985), the Supreme Court held that Edwards applied to all cases on direct review at the time Edwards was decided. Here, Bruni's direct appeal was pending at the time of the Edwards decision. Nevertheless, the state maintains that Shea is inapplicable because Bruni did not raise the issue of his alleged illegal interrogation on direct appeal. The state argues that to reap the benefit of Edwards, a defendant who had been appealing his conviction at the time of the Edwards decision must also have been appealing an Edwards issue. We need not address this argument, however, as we find that no Edwards violation occurred.

must stop further questioning, except to clarify the defendant's desire for counsel. United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987), petition for cert. filed, (Feb. 9, 1988).

In the present case, the district court determined that Bruni unequivocally waived his right to counsel upon his arrest. In response to Officer Comstock's request that he answer her questions, Bruni replied, "Not without my attorney." He then added, "Well, ask your questions and I will answer those I see fit."

[2] Bruni asserts that by invoking his right to counsel and then immediately waiving that right he made an equivocal request for counsel. However, there is no reason to interpret as equivocal either Bruni's unambiguous invocation of his right to counsel or his subsequent

equally unambiguous waiver of that right. See Connecticut v. Barrett, 107 S.Ct. 828, 832 (1987) (With respect to requests for counsel under the fifth amendment, "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous."). As commonly understood, Bruni's second statement effected a selective waiver by indicating an agreement to answer some questions but not others. Therefore, to the extent that Bruni later chose to answer questions, he waived his right to counsel.[3]

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[3]Bruni's declarations differ markedly from ambiguous responses in other cases that were held to be equivocal requests for counsel. See, e.g., United States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985) (statement that defendant "might want to talk to a lawyer"); United States v. Cherry, 733 F.2d 1124, 1130 (5th Cir. 1984) (defendant stated "maybe I should talk to an attorney before I make a

Since Bruni's statements effected a waiver of his Miranda rights, the district court correctly ruled that the subsequent interrogation did not violate Edwards. The issue remains, however, whether Bruni's statement to Detective Kohlman was an equivocal request for counsel.

[3] Upon receiving his Miranda rights for the second time, Bruni again indicated that he understood his rights. When Detective Kohlman thereafter sought to question him, Bruni stated that he would answer "those [questions] he felt good to answer or that he thought his

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further statement," and a few minutes later added, "why should I not get an attorney?"); Nash v. Estelle, 597 F.2d 513, 519 (5th Cir.)(en banc) (defendant stated that "I would like . . . to have [an attorney] appointed" and a minute later asserted that "I would like to have a lawyer, but I'd rather talk to you"), cert. denied, 444 U.S. 981 (1979).

attorney would probably advise him to answer."

[4] Bruni's statement was not an attempt to invoke a present right to counsel.[4] See United States v. Jardina, 747 F.2d 945, 949 (5th Cir. 1984), cert. denied, 470 U.S. 1058 (1985). Furthermore, his mere mentioning of his attorney does not suffice to render this statement an equivocal request for counsel. See id. (noting that "[t]he word 'attorney' has no talismanic qualities"). Bruni had had prior felony arrests and so probably felt sufficiently familiar with arrest procedures to respond to questions that he wanted to answer or that he believed

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[4] In contrast, shortly before making this statement, Bruni had made a clear request to have an immediate conference with his parole officer, which was granted.

his attorney would allow him to answer. Thus, we do not construe this statement as an equivocal request for counsel.

CONCLUSION

No state procedural rule bars review of Bruni's habeas petition. We AFFIRM the district court's denial of Bruni's petition on the merits.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN ALLEN BRUNI, Petitioner-Appellant,	)	
vs.	)	No. 87-2990
SAMUEL LEWIS, Director of Arizona Department of Corrections, ROBERT CORBIN, Attorney General, State of Arizona, Respondents-Appellees.	)	DC No. CV 87-0270-ACM
	)	ORDER

Before: CHOY, GOODWIN, and BEEZER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

APPENDIX C

COURT OF APPEALS

MEMORANDUM DECISION

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

THE STATE OF ARIZONA, Appellee/Respondent, v. STEVEN ALLEN BRUNI, Appellant/Petitioner.	2 CA-CR 2523-2 2 CA-CR 2993-3PR (Consolidated) MEMORANDUM DECISION Not for Publication, Rule 48, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. CR-02082

Honorable James C. Carruth, Judge

AFFIRMED

Robert K. Corbin, The Attorney General
by William J. Schafer III
and Diane M. Ramsey Phoenix

Attorneys for Appellee/Respondent

Richard S. Fields Tucson

Attorney for Appellant/Petitioner

PER CURIAM.

This consolidated appeal and petition for review is the continuation of our case of State v. Bruni, 129 Ariz. 312, 630 P.2d 1044 (App. 1981), in which we affirmed appellant's convictions on 14 counts of kidnapping and sexual assault, but remanded for resentencing. Resentencing occurred on October 19, 1981, and notice of appeal was filed that day. The appeal was stayed for appellant to file a petition for post-conviction relief which was summarily denied by the trial court on July 15, 1982. After his motion for rehearing was denied, appellant filed a petition for review on January 12, 1983, and it was consolidated with the appeal.

Appellant's first claim is that he was entitled to an evidentiary hearing on the trial in absentia issue. We do not agree. Since the issue was not raised on appeal in 1981, it has been waived. State v. Gaffney,

121 Ariz. 271, 589 P.2d 914 (App. 1979); Rule 32.2, Arizona Rules of Criminal Procedure, 17 A.R.S. This also applies to appellant's attack on the merits of the trial in absentia. Even assuming there was no waiver, appellant was warned the trial would proceed in his absence and he was present in court when the trial was reset. A defendant has a duty to keep abreast of his trial date and his failure to do so will support the finding that he is voluntarily absent. State v. Sanchez, 116 Ariz. 118, 568 P.2d 425 (App. 1977).

Third, appellant's claim regarding the voluntariness of his statements was explored in pretrial motions but not raised on appeal and therefore is deemed waived. Rule 32.2(a)(3), Arizona Rules of Criminal Procedure, 17 A.R.S. In any case, appellant was willing to talk and no constitutional violation occurred. State v. Hicks, 133

Ariz. 64, 649 P.2d 267 (1982). Additionally, appellant maintains the trial court improperly admitted certain items at trial. We found those items were properly admitted in State v. Bruni, supra.

Finally, appellant maintains he was improperly resentenced because the court did not repeat what was said at the first sentencing as the reasons for an aggravated sentence. At the first sentencing, the trial judge stated:

> "The court notes these are aggravated sentences and in imposing them the court considered the physical suffering of the victims, a weapon, the defendant's previous record, his flight from prosecution, the fact he failed to appear for trial and that he constitutes a danger to the community."

At the resentencing, the court incorporated by reference the aggravating factors on the record at the first sentencing. There was no objection. The

procedure meets the requirements of A.R.S. § 13-703(C). See, State v. Bishop, ___Ariz.___, ____P.2d____, (2 CA-CR 2436 and 2633-2PR, filed 3/24/83), where we held that the reasons for imposing an aggravated, consecutive sentence did not have to be stated twice to meet the requirements of A.R.S. §§ 13-702(C) and 13-708. It would serve no purpose to remand to have the trial court read the words into the sentencing record.

Affirmed.

LAWRENCE HOWARD, Chief Judge

BEN C. BIRDSALL, Judge

JAMES D. HATHAWAY, Judge

APPENDIX D

SUPREME COURT ORDER

SUPREME COURT
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602)255-4536
Phoenix 85007

December 21, 1983

STATE OF ARIZONA,	) Supreme Court
	) No. 6119-PR
Appellee/Respondent,	)
	) Court of Appeals
vs.	) Nos. 2 CA-CR 2523-2
	) and 2 CA-CR 2993-3PR
STEVEN ALLEN BRUNI,	) (Consolidated)
	)
Appellant/Petitioner.	) Pima County
	) No. CR-02082

The following action was taken by the Supreme Court of the State of Arizona on December 20, 1983 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 21st day of December, 1983.

S. ALAN COOK, Clerk

By /S/ Karen Rosenquist
Deputy Clerk

TO:

Richard S. Fields, Esq., Linden, Chapa & Fields, Broadway Center, Suite 265, 4911 E. Broadway, Tucson, AZ 85711

Hon. Robert K. Corbin, Attorney General, 1275 W. Washington, Phoenix, AZ 85007
Attn: William J. Schafer III, Esq., and Diane M. Ramsey, Esq.

Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 416 W. Congress, Tucson, AZ 85701

6775d

No. 88-372

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SAMUEL LEWIS, ET AL.,

Petitioners,

vs.

STEVEN ALLEN BRUNI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether a federal habeas corpus court may adjudicate a state prisoner's constitutional claims when the state courts have addressed both procedural default and the merits of those claims.

2. Whether this Court may grant a petition for a writ of certiorari to review a lower court judgment in favor of the petitioner, when the losing party has not yet filed a cross-petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	6
APPENDIX A (Opinion of the District Court)	A-1
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page
Bradford v. Stone, 594 F.2d 1294 (9th Cir. 1979)	2
Edwards v. Arizona, 451 U.S. 477 (1981)	1,2,4
Harris v. Reed, 822 F.2d 684 (7th Cir. 1987), cert. granted, 108 S.Ct. 1107 (1988)	5
Huffman v. Ricketts, 750 F.2d 798 (9th Cir. 1984)	2
Miranda v. Arizona, 384 U.S. 436 (1966)	2,4
Muskrat v. United States, 219 U.S. 346 (1911)	4
Perez v. Ledesma, 401 U.S. 82 (1971).	4
Public Service Commission v. Brashear Lines, 306 U.S. 204 (1939)	4
Smith v. Murray, 477 U.S. 527 (1986).	4
Walker v. Endell, 828 F.2d 1378 (9th Cir. 1987)	2

STATEMENT OF THE CASE

The respondent, Steven Allen Bruni, was convicted in an Arizona trial court of several counts of kidnapping, sexual assault, and aggravated assault. Prior to his trial, Mr. Bruni moved to suppress, on Fifth Amendment grounds, certain statements he had made to police officers following his arrest. That motion was denied, and the statements were introduced against Mr. Bruni at trial. (Pet. at 5).

Mr. Bruni did not challenge the admissibility of his statements on direct appeal. However, in a subsequent post-conviction proceeding in the state trial court, Mr. Bruni claimed that his statements had been admitted into evidence in violation of Edwards v. Arizona, 451 U.S. 477 (1981), which had been decided while his direct appeal was pending. The state trial court summarily denied relief. The Arizona Court of Appeals affirmed this ruling, on the following grounds:

> [A]ppellant's claim regarding the voluntariness of his statements was explored in pretrial motions but not raised on appeal and therefore is deemed waived. . . . In any case, appellant was willing to talk and no constitutional violation occurred.

(Pet. at C-3). The Arizona Supreme Court denied review of the Arizona Court of Appeals' decision without opinion. (Pet. at D-1).[1]

Mr. Bruni then filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, raising the single claim that the state trial court's admission of his statements violated

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[1] Although the Court of Appeals used the term "voluntariness," it plainly was referring to the Edwards issue, since that was the only issue the respondent had raised with respect to the admission of his statements.

Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona, supra. In the District Court, the petitioners argued (a) that review of Mr. Bruni's claim on the merits was precluded by a procedural default in the state courts, and (b) that Mr. Bruni's rights had not been violated. The District Court rejected the first of these arguments, but accepted the second. (App. A, infra). Mr. Bruni appealed this ruling to the Court of Appeals.

In the Court of Appeals, the petitioners re-asserted their argument that federal habeas corpus review of the merits of Mr. Bruni's constitutional claim was precluded by procedural default. Like the District Court, the Court of Appeals rejected this argument on the ground that the Arizona Court of Appeals had addressed the merits, citing Walker v. Endell, 828 F.2d 1378, 1382 (9th Cir. 1987), Huffman v. Ricketts, 750 F.2d 798, 800-801 (9th Cir. 1984), and Bradford v. Stone, 594 F.2d 1294, 1296, n. 2 (9th Cir. 1979). (Pet. at A-10). However, the Court of Appeals then held that Mr. Bruni's Fifth/Fourteenth Amendment rights had not been violated, and entered judgment for the petitioners. (Pet. at A-19). The Court of Appeals subsequently denied the petitioners' petition for rehearing. (Pet. at B-1). The petitioners now seek review of the Court of Appeals' procedural-default holding, notwithstanding the fact that its judgment was favorable to the petitioners.

Pursuant to Rule 22.1, this Brief in Opposition to Certiorari is being filed within 30 days of the date on which Respondent Bruni's counsel received the Petition for a Writ of Certiorari (August 24, 1988).

SUMMARY OF ARGUMENT

The Court of Appeals ruled in favor of the petitioners on the merits, and to date Respondent Bruni has not filed a petition or cross-petition for a writ of certiorari. Consequently, at this point in time the petitioners have presented no case or controversy that this Court may review. However, when Mr. Bruni files a cross-petition for a writ of certiorari, as he intends to do on or before October 5, 1988, this Court may grant both the cross-petition and the petition in order to review the merits of Mr. Bruni's challenge to his state-court conviction and the "procedural default" issue raised by the petitioners.

ARGUMENT

In the courts below, Respondent Bruni challenged his state court convictions on the ground that the state trial court improperly had admitted into evidence statements that had been obtained in violation of the respondent's Fifth and Fourteenth Amendment rights under Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona, 451 U.S. 477 (1981). The petitioners opposed the granting of a writ of habeas corpus on two grounds: (1) that Mr. Bruni's constitutional rights had not been violated, and (2) that Mr. Bruni's alleged procedural default in the state courts precluded federal habeas corpus review under Smith v. Murray, 477 U.S. 527 (1986).

Like the District Court, the Court of Appeals rejected the petitioners' procedural-default argument because the state courts had adressed the merits of Mr. Bruni's constitutional claims. However, the Court of Appeals then ruled in the petitioners' favor on the merits. (Pet. at A-19). In the absence of a cross-petition for a writ of certiorari, the pending petition therefore does not present any case or controversy that this Court may review. Given the fact that the Court of Appeals entered judgment for the petitioners, any decision by this Court on the mooted procedural-default issue raised by the pending petition would be an advisory opinion. See, e.g., Perez v. Ledesma, 401 U.S. 82, 87, n. 5 (1971); Public Service Commission v. Brashear Lines, 306 U.S. 204, 206 (1939); Muskrat v. United States, 219 U.S. 346 (1911).

However, if and when Mr. Bruni files a timely cross-petition for a writ of certiorari seeking review of the Court of Appeals' decision on the merits, the procedural-default issue raised by the pending petition no longer will be moot. Mr. Bruni does intend to file a cross-petition on or before October 5, 1988, which is ninety days from the Court of Appeals' denial of rehearing. If this Court grants his cross-petition, Mr. Bruni does not oppose the simultaneous granting of the pending petition. While Mr. Bruni does not agree with the petitioners' assertion that the Court of Appeals' decision on the procedural-default issue was incorrect, or with the petitioners' analysis of the majority rule with respect to the availability of federal habeas corpus review when the state courts have adressed both procedural default and the merits (Pet. at 9-10), Mr. Bruni does agree that the Court of Appeals' approach to the procedural-default issue in this case conflicts with some decisions by other Circuit Courts of Appeals. See Harris v. Reed, 822 F.2d 684 (7th Cir. 1987), cert. granted, ___ U.S. ___, 108 S.Ct. 1107 (1988).

CONCLUSION

For the reasons stated above, Respondent Bruni respectfully requests that this Court withhold any decision on the pending petition for a writ of certiorari until this Court has received and considered a timely cross-petition.

RESEPCTFULLY SUBMITTED,

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APPENDIX A

(District Court Opinion)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

STEVEN ALLEN BRUNI,

Petitioner,

vs.

SAMUEL LEWIS, Director of Arizona Department of Corrections and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA, ROBERT CORBIN

Respondents.

No. CIV 87-270 TUC ACM

ORDER

Petitioner, Steven Allen Bruni, has petitioned this court for habeas corpus relief pursuant to 28 U.S.C. §2254.

FACTS

Petitioner was convicted by a jury of 14 counts of sexual assault, kidnapping, and aggravated assault (A.R.S. 13-1203(A)(1), (2), and (3), and (B), 13-1204(A)(1) and (2) and (B), 13-701, 13-702, 13-801, 13-803 and 13-604(B) and (D). Petitioner appealed. On May 4, 1981, the Court of Appeals affirmed the judgment and sentence, but remanded for resentencing on two counts. Petitioner was sentenced to consecutive and concurrent terms on the various counts resulting in a term to be served of 56 years. A motion for rehearing was denied. Petitioner filed a Petition for Review in the Arizona Supreme Court on June 18, 1981. The Supreme Court denied the petition on July 1, 1981.

Petitioner appealed to the Arizona Court of Appeals after resentencing. This appeal was stayed pending the outcome of a Petition for Post-Conviction Relief filed under Rule 32 of the Arizona Rules of Criminal Procedure. The Rule 32 Petition was denied on July 15, 1982. The appeal on the resentencing was consolidated with the appeal on the denial of Rule 32 relief. The Court of Appeals affirmed both the resentencing and the denial of the Rule 32 petition. A motion for rehearing was filed on this ruling, which was denied on October 19, 1983. Petitioner then filed a petition for review with the Arizona Supreme Court. This was denied on December 20, 1983. Petitioner filed his petition for writ of habeas corpus on May 5, 1987.

PETITION

Petitioner listed five grounds for relief in his petition:

1) Admission at trial of statements and other fruits of illegal interrogation occurring after petitioner invoked his right to counsel in violation of fifth and fourteenth amendments;
2) Infringement of right against self-incrimination;
3) Lack of jurisdiction in the court which rendered judgment;
4) Sentence imposed other than in accordance with proper sentencing procedures;
5) Due process violation when petitioner was tried in

absentia without a showing that he had voluntarily waived his right to be present at trial.

However, in the memorandum in support of the petition and in all subsequent pleadings, the single issue raised and argued is petitioner's denial of his right to counsel under Edwards v. Arizona 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Grounds 2 and 3 are resolved by the court's decision as to ground 1.

Regarding ground 5, the court has reviewed the trial court's discussion of petitioner's absence at his trial, wherein it was indicated that petitioner's wife made defense counsel to understand petitioner's whereabouts were unknown, that petitioner had gotten notice of his trial date at a previous hearing; and that petitioner was absent as a result of his own conscious choice. (R.T. of August 27, 1980, Respondent's Exhibit 14 to Answer to Petition). The court finds petitioner was not denied due process.

Regarding ground 4, other than the conclusory listing of this claim, petitioner has failed to make any showing of an improper sentencing. The court's review of the trial court sentencing proceedings fails to disclose any impropriety.

PROCEDURAL DEFAULT

A state prisoner seeking federal habeas corpus relief must exhaust all available state remedies. 28 U.S.C. §2254(a). Respondents claim petitioner procedurally defaulted in that he

AO 72
Rev.8/82)

23

did not challenge the voluntariness of his statements on direct appeal and that he has failed to show cause and prejudice and required under Engle v. Isaac 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A state court's failure to rest exclusively upon the procedural default permits the federal court in a habeas corpus petition to reach the merits raised in that petition. Bradford v. Stone 594 F.2d 1294, 1296, n.2 (9th Cir. 1979). In this case, the court of appeals did comment on the legality of the interrogation of petitioner and explicitly found that no constitutional violation occurred. State v. Bruni No. 2 CA-CR 2523-2, memorandum decision at 2, Dec. 21, 1983. See Respondent's Exhibit 10. Consideration of voluntariness by the Court of Appeals, notwithstanding the waiver, is sufficient to allow this court to reach the merits of petitioner's claim.

RIGHT TO COUNSEL

The Fifth Amendment rule announced in Edwards v. Arizona 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) has been held to apply retroactively to cases on direct review when Edwards was decided. Griffith v. Kentucky 107 S.Ct. 708, 715 (1987). Edwards is applicable to this case, then, since petitioner's conviction did not become final until after the Edwards decision was rendered.

The Court in Edwards held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be

O 72
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24

established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. Edwards 101 S.Ct. at 1884-5. An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Id. The Court went on to make clear what its holding did not mean:

> "[W]e do not hold or imply that [the defendant] was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by [the defendant] prior to his having access to counsel."

Edwards at 1885.

In this case, petitioner claims police officers violated his constitutional rights by conducting an interrogation after he had invoked his right to counsel. The record indicates that on October 22, 1979, petitioner's car was stopped by Tucson Police Officer Gracie because of unusually loud muffler pipes. (R.T., August 12, 1980 at page 61. Having stopped the vehicle, the officer identified the vehicle as one suspected being involved in a number of sexual assault cases under investigation. The officer then notified his supervisor, who in turn notified the sex crimes officer, Detective Comstock. who appeared at the scene. R.T. August 12, 1980 at 66. Petitioner was identified as the suspect in several sexual assaults which

72
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25

had occurred two weeks prior to the stop. It was at this point that petitioner was place under arrest by Detective Comstock and was advised of his right to remain silent and his right to have an attorney present under Miranda v. Arizona. R.T. August 12, 1980 at 84:

Q: Did you then advise him of his Miranda rights?

A: Yes, I did.

Q: And how do you do that?

A: I read them verbatim from the Miranda rights card.

. . .

Q: At that time, did you ask Mr. Bruni any questions?

A: I asked him if he understood his rights, yes.

Q: And what did he say?

A: He said, "Yes."

Q: And what happened with Mr. Bruni then?

A: I asked him if he wanted to answer our questions regarding the incident?

Q: And what did he say?

A: He initially said, "Not without my attorney." And then he added immediately after that, "Well, ask your questions and I will answer those I see fit."

Q: Now, between the first statement and the second, did you say anything to him?

A: No.

Q: And did you start asking him any question at that point?

A: I asked him if that meant that he would be willing to answer the questions that he wanted to answer himself and he said, "Yes."

R.T. August 12, 1980 at 85-86. At this point petitioner was transported to the Pima County Attorney's office where petitioner was again advised of his rights and where a tape recorded statement was taken:

Q: When you started tape recording your conversation with Mr. Bruni did you give him his Miranda rights first?

A: I did.

. . .

Q: What did he indicate after you gave him his Miranda warnings?

A: He indicated that he had understood his rights. When I asked him if he would answer our questions, he indicated those that he felt good to answer or that he thought his attorney would probably advise him to answer.

. . .

Q: During the course of your tape recorded conversation with Mr. Bruni, did he ever tell you he wanted to stop talking to you?

72
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27

A: No, he did not.

Q: Did he ever indicate to you that he wanted to have a lawyer present before he discussed the matter with you any further?

A: No, he did not.

R.T., August 12, 1980 at 103-104.

The exchange as quoted above makes clear that a determination needs to be made as to whether the police appropriately resumed questioning defendant under the Edwards test. In addition, since the resumed questioning was clearly interrogation, the question then becomes whether a valid waiver of the right to counsel and the right to silence occurred. See Oregon v. Bradshaw 103 S.Ct. 2830, 2834 (1983) ("But even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel,' is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver. . .").

The standards to determine when a valid waiver is given were established in Johnson v. Zerbst 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938):

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver. . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background experience, and conduct of the accused."

Johnson 58 S.Ct. at 1027. Any possible waiver made by petitioner must be found to have been 1) voluntary and 2) knowingly and intelligently given. Edwards v. Arizona, supra at 1884.

The record shows that Bruni indicated his desire to have an attorney present by stating "Not without my attorney," and immediately following that, without any prompting by police, volunteered to answer those questions he saw fit to answer. Nothing was said by police after petitioner's reference to an attorney. Petitioner himself initiated communication with police. The court finds that this comports with the Edwards rule allowing police to resume interrogation and that petitioner's comment constituted a valid waiver of his fifth amendment rights to silence and the presence of counsel.

Petitioner argues that the Mr. Bruni's statements were, at a minimum, an equivocal request for counsel. The court disagrees. There is nothing ambiguous or equivocal about petitioner's stating "Not without my attorney." Nor is there any ambiguity about his change of mind, immediately following. Petitioner voluntarily agreed to answer questions.

Petitioner's comment to police in this case is certainly clearer than what was considered in Oregon v. Bradshaw. The defendant there asked police "Well, what is going to happen to me now." The Court evaluated this comment thusly:

"Although ambiguous, the respondent's question

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29

> in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. . . On these facts we believe that there was not a violation of the Edwards rule.

Bradshaw at 2835. The Court then affirmed the appellate court's finding that a valid waiver had occurred:

> "[T]he Oregon Court of Appeals 'found that the police made no threats, promises or inducements to talk, that defendant was properly advised of his rights and understood them and that within a short time after requesting an attorney he changed his mind without any impropriety on the part of police.

Id.

The court finds that this case presents an even stronger case than Bradshaw. Petitioner was advised of his rights no less than twice. He indicated both times he understood these rights. There is no evidence on the record that petitioner was suffering from any mental incapacity at the time of questioning; nor did he show signs of intoxication. His comment immediately following his reference to an attorney explicitly and clearly indicated he had voluntarily agreed to answer questions. The statement makes no equivocal reference to petitioner's desire for an attorney and this distinguishes this case from those cited by petitioner. (See Nash v. Estelle 597 F.2d 513, 517 (5th Cir. 1979); United States v. Fouche 776 F.2d 1398, 1405 (9th Cir. 1985); United States v. Prestigiacomo 504 F.Supp 681, 683 (E.D. N.Y. 1981).

72
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For these reasons,

IT IS ORDERED the petition is denied. Petitioner's writ for habeas corpus relief is dismissed with prejudice.

Dated this 26th day of October, 1987.

ALFREDO C. MARQUEZ
United States District Judge

Copies mailed this date to:

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31

Certificate of Service

The undersigned hereby certifies that on the 23d day of September, 1988, he mailed one copy of the foregoing document, with first-class postage pre-paid, to counsel for the petitioners:

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All parties required to be served have been served.

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